***National Labor Relations Board***
**OFFICE OF THE GENERAL COUNSEL**
**Advice Memorandum**

**DATE:** October 27, 1997

**TO:** Gerald Kobell, Regional Director, Region 6

**FROM:** Barry J. Kearney, Associate General Counsel, Division of Advice

**SUBJECT:** New Warwick Mining Company, Case 6-CA-28652

240-3367-8362-1000, 596-0420-5050, 530-8045-6200, 530-8045-6201

This case was submitted for advice on whether the Employer's refusal to process a grievance regarding its failure to pay awards to employees under a safety award program constitutes a repudiation of its contractual obligation in violation of Section 8(a)(5), and whether the refusal to process the grievance triggered the commencement of the 10(b) period.

FACTS

On July 28, 1993, the parties commenced a Resolutions by Objective Program (RBO) designed to help the Employer and the Union resolve contractual issues and disputes outside the formal grievance procedure. One of the goals of the RBO process was to address safety issues at the mine and reduce the number of fines and violations assessed by the U.S. Mine Safety and Health Administration. As a result, a committee made up of management officials, Union representatives and employees devised the Accident Prevention Incentive Program (APIP) which became effective March 7, 1994. The APIP provided that unit and non-unit employees would be eligible to receive vouchers to purchase merchandise based upon each employee's respective contribution to the reduction in accidents and injuries at the mine.[(2)] The APIP provided that annual awards would be calculated each December so that the vouchers could be distributed to the employees with their last pay preceding the Christmas holiday. Accordingly, the first annual awards were due for disbursement to employees on December 9, 1994.

At the December 19, 1994 meeting of the RBO, Employer President Grant MacSwain advised the Union that the Employer could not afford to pay the safety awards which had accrued from March 7 through December 9, 1994. MacSwain assured the Union that payment would be made when the financial status of the Employer permitted. The Union agreed to defer payment. Thereafter, at subsequent RBO meetings the Union continued to inquire concerning payment of the safety awards. The Employer's representatives repeatedly assured the Union that, while it did not presently have the funds available to make the payments, the accrued safety awards would ultimately be distributed to all those employees entitled to such payments, including any employees who had subsequently separated their employment with the Employer.

On October 23, 1995, at an RBO meeting, the Union requested that the parties terminate the APIP program. The Union indicated that the Employer had not made one payment of awards under the program and asserted that it was pointless to continue the program while the Employer could not pay and the Union had to constantly assure employees they would eventually receive their awards. The parties agreed to discontinue the program, and at the Union's request the Employer posted a notice to all employees advising them of the termination of the program and acknowledging the Employer's continued obligation to pay all awards accrued as of October 23, 1995. The Employer has calculated that the total amount of safety awards accrued by employees is approximately $124,236 for the operation of the APIP from March, 1994 through October, 1995.

The parties held their last RBO meeting on January 16, 1996. At that meeting, the Union proposed filing a grievance over the Employer's failure to pay the safety awards and asked MacSwain if he would hold the grievance in abeyance. MacSwain stated his willingness to do so. MacSwain further offered to sign a document acknowledging the debt and assuring that payment would be made when the funds became available. The Union did not present the Employer with a formal grievance at that time. The Union also did not prepare a document for the Employer to sign acknowledging the debt.

On January 6, 1997, the Union filed a grievance seeking payment of the outstanding safety award money. Although it appears the parties have, on occasion, waived grievance time limitations, the Employer denied the grievance on January 7 as untimely.

The parties do not dispute the Employer's financial inability to pay the safety awards. In November 1996, the Employer began laying off employees. The Employer ceased active mining operations entirely in early 1997. It appears that a new employer, H&H, has taken over the New Warwick site and has signed an agreement with the Union.

MacSwain has acknowledged to both the Board and the Union that the Employer owes the benefits that the Union seeks to recover. MacSwain explains that he is not willing to give the Union a written acknowledgment of the debt because he fears that, if other creditors learned of this debt, such a document might force the Employer into bankruptcy. In addition, MacSwain states that he has remained willing and ready to bargain at any time with the Union over the Employer's inability to pay the safety award benefits, but that the Union has never requested bargaining over this issue.

ACTION

The Region should dismiss the charge, absent withdrawal.

Initially, we conclude that the Employer has not repudiated its obligation to pay the safety award benefits. In this regard, it is clear that the APIP required the Employer to pay the first round of safety awards in December, 1994. However, when the Employer's obligation came due, the Employer requested, and the Union agreed, to extend the Employer's obligation to pay until such time as the funds were available. Thus, it appears the parties modified the APIP agreement to allow for payment at an uncertain date in the future when the Employer had sufficient funds to meet its obligation.

The parties do not dispute that the Employer has at all times been unable to meet its financial obligation under the APIP. Therefore, the condition precedent to the Employer's obligation to pay the safety awards has not occurred. Accordingly, the Employer's continued deferral of its obligation to pay, at least until the Union filed its grievance in January 1997, is in accord with the parties' modified agreement and does not constitute a unilateral change in violation of Section 8(a)(5).

We further conclude that the Employer's denial of the Union's grievance was not a repudiation of its obligation to pay the safety awards. The Employer denied the grievance on timeliness grounds, and not on the merits of the grievance. At no time has the Employer stated that it would not pay the awards when it is financially able. In fact, the Employer has stated to the Region that it continues to acknowledge its obligation, and that it stands ready and willing to bargain with the Union over this issue. Although the Employer has refused the Union's recent request to provide a written assurance of its obligation, that refusal does not amount to a repudiation of the obligation to pay and was not required by the parties' modified agreement.[(3)]

At most, the Employer's current failure to pay the safety awards would constitute a breach of the parties' agreement, and not a repudiation of its obligation to bargain. In this respect, it is well-settled that not all breaches of contract constitute unfair labor practices.[(4)] Here, it does not appear that a breach of the Employer's obligation to pay the safety awards is a contract repudiation that would undermine the collective-bargaining relationship between the Employer and the Union. Rather, the case at the present time is analogous to a collection case, which is more properly suited for a Section 301 action in district court.[(5)]

In sum, the Union currently is not without other recourse to obtain the safety awards owed by the Employer. Since the Employer has not repudiated its overall bargaining obligation, the Union could request bargaining with the Employer to establish a payment schedule, to obtain a written acknowledgment of the outstanding debt, or to otherwise modify the parties' current agreement. Should the Employer violate Section 8(a)(5) in connection with renewed bargaining over the subject or subsequently repudiate its obligation to pay the awards, Section 10(b) would not bar the issuance of an unfair labor practice complaint against the Employer.[(6)]

For all these reasons, the Region should dismiss the charge, absent withdrawal.

B.J.K.

[1] The Employer, a wholly owned subsidiary of Aloe Mining Corporation, supplied coal to Duquesne Light, a local electrical utility, for use in its fossil fuel generation plants.

[2] The committee that developed the APIP devised a specific formula for calculating each employee's share of the safety awards.

[3] Compare Wind-Chester Roofing Products, 302 NLRB 878 (1991)(Board finds repudiation where employer suggests for first time that bills might never be paid after repeated assurances to union that employee medical bills would be paid when funds were available.)

[4] See Teamsters Local Union 284 (Columbus Distributing Co.), 296 NLRB 19, 23 (1989); C&S Industries, Inc., 158 NLRB 454, 458 (1966).

[5] See Memorandum GC 95-8, "Collection Cases", June 6, 1995.

[6] See Wind-Chester Roofing Products, supra (complaint not time-barred where charge filed within six months of employer's repudiation of obligation to pay employee medical bills, where employer had repeatedly assured union bills would be paid when funds were available); Universal Enterprises, 291 NLRB 670, 671 (1988) (10(b) period not triggered by employer's initial failure to make benefit payments where parties agreed to postpone obligation; 10(b) begins to run when employer later reneges on agreement and refuses to make payments).